

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Applications of	)	MM Docket No. 90-638
	)	
HEIDI DAMSKY	)	File No. BPH-880816MW
	)	
HOMEWOOD RADIO CO., L.L.C.	)	File No. BPH-880816NR
	)	
For Construction Permit for a	)	
New FM Station on Channel 247A	)	
in Homewood, Alabama	)	

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION  
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OPPOSITION TO APPLICATION FOR REVIEW

HOMEWOOD RADIO CO., L.L.C. ("HRC"),<sup>1/</sup> pursuant to Section 1.115(d) of the Commission's Rules, 47 C.F.R. § 1.115(d), hereby opposes the "Application for Review," filed August 13, 1998 (the "Appeal") by Heidi Damsky ("Damsky").<sup>2/</sup> Damsky protests the issuance on August 3, 1998 of HRC's construction permit by the Audio Services Division ("ASD"). To the extent that Damsky's appeal seeks relief pending Commission action on administrative appeals of the denial of her application, the Appeal is now moot. In the alternative, the Appeal is procedurally defective in that it seeks Commission review of a non-reviewable action -- the mere issuance of a construction permit, grant of which was already the subject of an appeal by Damsky. Thus, the Commission should dismiss the Appeal.

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<sup>1/</sup> By *Memorandum Opinion and Order* in Heidi Damsky, 13 FCC Rcd \_\_\_\_ (FCC 98-81, released May 6, 1998), the Commission granted the Joint Request for Approval of Settlement that provided for the merger of Homewood Partners, Inc. and WEDA, Ltd. ("WEDA") into HRC and granted application for construction permit of WEDA, as amended, in the name of HRC.

<sup>2/</sup> HRC's Opposition is timely filed. 47 C.F.R. §§ 1.7 and 1.115(d). The Certificate of Service indicates that the Appeal was mailed on August 12, 1998 and, therefore, lodged with the Commission no earlier than August 13, 1998.

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**A. Argument in Opposition**

1. First, it is important to correct the misstatement of the facts made by Damsky. This Appeal is not, as Damsky would have it, part of a "comparative FM proceeding involving three competing applicants." (Appeal, p. 1). That proceeding is the Homewood FM case, MM Docket No. 90-638, where the Commission has granted HRC's application and denied Damsky's mutually exclusive application as financially unqualified. See Memorandum Opinion and Order. On May 22, 1998, Damsky filed a Petition for Reconsideration of the Commission's decision. On June 1, 1998, Damsky filed an "Emergency Motion for Stay" of the *Memorandum Opinion and Order*. Heidi Damsky, 13 FCC Rcd \_\_\_\_ (FCC 98-202, released August 25, 1998). The Commission has now denied reconsideration and dismissed the stay request. By contrast, the subject of the Appeal is the ASD's *issuance* on August 3, 1998 of the construction permit for HRC's Homewood, Alabama FM station, not the underlying action granting the HRC application and denying Damsky's application.

2. The Appeal states that: "The form of relief sought is simply rescision of the construction permit until the Commission has acted upon Damsky's pending Petition for Reconsideration and Emergency Motion for Stay." (Appeal, p. 4). Given the Commission's denial of reconsideration and stay on August 25, 1998, there is no basis for further "relief". Accordingly, the Commission can dismiss the Appeal as moot.

3. Even assuming *arguendo* that the Commission had not yet disposed of Damsky's administrative appeals of the underlying grant of the HRC application, Damsky is not correct in asserting that the issuance of a construction permit, as

opposed to the underlying grant of the application, is a reviewable act. The issuance of a construction permit is a ministerial act. Kyles Broadcasting, Ltd., 5 FCC Rcd 5846 (¶ 3) (1990) (validity of construction permit not affected by the fact that ministerial act of actually issuing the permit had not occurred). The grant of HRC's application became effective upon the release of the *Memorandum Opinion and Order* on May 6, 1998 -- nearly 3 months prior to issuance of the construction permit. 47 C.F.R. § 1.103(a). Neither the filing of Damsky's Petition for Reconsideration, nor even the mere act of Damsky's filing the Stay Request, functioned to stay or otherwise alter the effectiveness of the grant of the application. Paxton Community Antenna Systems, Inc., 52 FCC 2d 568, 569 (¶ 4) (1975) ("We must reject the contention that the filing of a petition for reconsideration or a motion for stay automatically stays the effect of a Commission decision.") See also, 47 C.F.R. § 1.106(n). By issuing the Homewood construction permit to HRC, the ASD did no more than provide HRC that to which is was entitled by virtue of the *Memorandum Opinion and Order*.

4. Further, in doing so, the ASD was only doing what Commission precedent has clearly established: a successful applicant in a comparative proceeding is entitled to construct a station subject to the outcome of any appeal of the Commission decision. Orion Communications, Ltd. v. F.C.C., 131 F.3d 176, 179 (D.C. Cir. 1997); Highlands Broadcasting Co., 9 FCC Rcd 5746 (1994); David J. Bott and Carese Bott, 9 FCC Rcd 6426 (1994). See also the Lajas, Puerto Rico FM case, MM Docket No. 86-510, as reported in Ramon Rodriguez and Associates, Inc., 9 FCC Rcd 3275, 3282 (¶ 42) (Rev. Bd. 1994) (construction of station commenced after court remand for further hearing).

Such action is consistent, in turn, with Commission action allowing applicants to construct facilities or consummate transactions in the absence of final action. See Global Broadcasting Group, Inc., 10 FCC Rcd 5437 (1995) (Commission affirmed the grant of a minor modification application and the construction of the station, notwithstanding administrative appeals of the grant of the modified facilities); see also Improvement Leasing Co., 73 FCC 2d 676, 684, aff'd sub nom. Washington Ass'n for Television and Children v. F.C.C., 667 F.2d 1264 (D.C. Cir. 1984) (closing of assignment permitted without final order). In proceeding with construction of a station without final action, the grantee of a construction permit assumes the risk that because the action is not yet final, the Commission's decision might ultimately be reversed. Rebecca Radio of Marco, 5 FCC Rcd 2913 (1990).

5. Damsky contends that this is a unique situation; *i.e.*, there is no precedent for issuance of a permit where a competing applicant like Damsky has not completed administrative appeals. This is clearly incorrect. For example, in the Biltmore Forest, North Carolina FM case, the Commission had already issued the initial construction permit even while appeals were still pending before the Commission. Orion Communications, Ltd. v. F.C.C., supra, 131 F.3d at 177. Even if this were not the case, Damsky's argument constitutes a distinction without a difference. The Commission's action granting HRC's application and denying Damsky's application was effective upon release. 47 C.F.R. § 1.103(a). It was not otherwise subject to stay by the Commission just because Damsky filed her Stay Request. Paxton Community Antenna, supra.

6. Damsky's citations to the holdings of the D.C. Circuit in Consolidated Nine, Inc. v. F.C.C., 403 F.2d 585 (D.C. Cir. 1968) and Community Broadcasting Co., Inc. v. F.C.C., 274 F.2d 753 (D.C. Cir. 1960) are inapposite. Both those cases involved grants of applications for interim authority pending a decision in comparative licensing cases. See 47 C.F.R. § 73.3592 and predecessor rules. The Commission no longer entertains any such applications at all in comparative proceedings. Highlands Broadcasting, supra, 9 FCC Rcd at 5747, citing Phoenix Media Corp., 2 FCC Rcd 498, 500 n. 2 (Rev. Bd. 1987). As the Commission noted in Highlands Broadcasting in distinguishing Consolidated Nine, where the winning applicant that proceeds with construction is not entitled to any special equities, the public interest is served by continued operation of a new radio service. Id., 9 FCC Rcd at 5747 (¶ 12). Like the applicant in that case, HRC has specifically disclaimed any equities from construction. See Letter to ASD dated July 31, 1998, at p. 3 (Exhibit D to Appeal). Indeed, HRC specifically requested that the Commission condition the construction permit on the ultimate disposition of any administrative or judicial appeals by Damsky. Id., at p. 3; Letter dated July 21, 1998, at p. 2 (Exhibit B to Appeal).

#### **B. Conclusion**

7. There is no basis for consideration of the "merits" of the Appeal. There is no reviewable "action" under Section 1.115 of the Rules. Even if the issuance of the permit were to be deemed a reviewable action, there is no valid question for Commission review. 47 C.F.R. § 1.115(b)(1). As noted above, the mere filing of a Stay Request and a petition for reconsideration do not alter the effectiveness of the

underlying action. Further, there was no depriving of due process to Damsky. HRC's construction of the Homewood station is done at risk that the Commission or a reviewing court might reverse the grant of HRC's application. There is no basis for further consideration of the Appeal.

**WHEREFORE**, in light of the foregoing, HRC requests that the Commission dismiss or deny the Application for Review filed by Heidi Damsky.

Respectfully submitted,

**HOMEWOOD RADIO CO., L.L.C.**

By: 

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Dated: August 28, 1998

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## **CERTIFICATE OF SERVICE**

I, Lisa Y. Taylor, a secretary in the law firm of Patton Boggs LLP, do hereby certify that a copy of the foregoing "**OPPOSITION TO APPLICATION FOR REVIEW**" has been sent via U.S. Mail, First-Class postage prepaid, this 28th day of August, 1998 to the following:

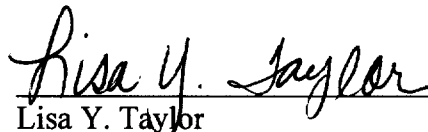
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